

**MEMORANDUM OF UNDERSTANDING
AMONG
SURFACE TRANSPORTATION BOARD'S SECTION OF ENVIRONMENTAL
ANALYSIS,
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION
AND
THE LOUIS BERGER GROUP, INC.**

**RE: TECHNICAL ASSISTANCE TO THE SURFACE TRANSPORTATION BOARD REGARDING
IMPLEMENTATION OF THE PROGRAMMATIC AGREEMENT IN STB FINANCE DOCKET
NO. 33407.**

I. Introduction and Purpose

- A. The Dakota, Minnesota and Eastern Railroad (DM&E) (Proponent) has received approval from the Surface Transportation Board (Board) to construct and operate approximately 280 miles of new rail line as part of its Powder River Basin Project, which includes rebuilding approximately 600 miles of its existing line (Undertaking).
- B. The Board was the lead agency for preparing the cultural resources documentation required for the Undertaking as required by the National Environmental Policy Act of 1969 (NEPA), and has considered the potential cultural resources impacts resulting from construction and operation of the Undertaking. The Board's Section of Environmental Analysis is responsible for ensuring the Board's compliance with Section 106 of National Historic Preservation Act (NHPA) 16 USC 470f.
- C. As the lead agency, the Board has a statutory obligation to fulfill the requirements of Section 106 (36 CFR 800). Therefore, the Board shall ensure that the measures detailed in the Programmatic Agreement (PA) are carried out. The PA is included with this Memorandum of Understanding (MOU) as Attachment 1.
- D. As provided for in the PA, the Board, through its Section of Environmental Analysis (SEA) will use an independent third party contractor to assist in meeting the Board's responsibilities. At the Proponent's expense, The Louis Berger Group (Contractor) has been engaged as the independent third party, and will assist SEA in the monitoring and enforcement of cultural resources mitigation measures on an as-needed basis until the Proponent has completed project-related construction and reconstruction activities, as well as during the oversight period imposed by the Board in Finance Docket No. 33407.
- E. Without relinquishing its responsibilities under the PA, SEA, together with the Proponent and the Contractor, agree to work within the framework of this MOU to develop and implement efficient methods that achieve the stipulations of the PA.

- F. This MOU summarizes the relationship among SEA, the Contractor, and the Proponent, as set forth in applicable regulations and Board policy, regarding conditions and procedures each party must follow in preparing all cultural resources documentation. This MOU does not supersede or amend, and is made expressly subject to, the requirements of the PA.

II. Agreement between Proponent and Contractor

- A. Any contract between the Proponent and Contractor, as well as any subcontracts, shall be consistent with the provisions of this MOU.
- B. The terms of this MOU shall override any contradictory or conflicting terms regarding the scope and performance of any work to be conducted under any contract entered into between the Proponent and Contractor; provided, however, that the foregoing shall not limit the rights of the Proponent and Contractor to contract on terms which require that the work be performed cost-effectively.
- C. The contract between the Contractor and Proponent shall specifically provide, and Contractor shall represent, that: (1) the Contractor and any subcontractors do not and shall not have any financial or economic interest in Proponent or the Undertaking, except for payment for services rendered in connection with the preparation of all required cultural resources documentation, and except for services rendered pursuant to other agreements not prohibited by this MOU; and (2) there is no agreement between the Proponent or any other party and Contractor regarding future employment that is contingent upon the Contractor's performance under this contract. Contractor shall concurrently execute a disclosure statement as mandated by the regulations of the Council on Environmental Quality (CEQ) (40 C.F.R. 1506.5(c)) and submit it to both SEA and the Proponent, before beginning any work under SEA's direction.
- D. Restriction on other work:
- (1) No employee of the Contractor or employee of any subcontractor, who is a part of the Contractor's core team committed to the cultural resources review process for the Undertaking shall engage in (a) other work for the Proponent, or (b) any work, relating to the Undertaking, for any other party to this proceeding during the course of this proceeding; and
 - (2) No other employee of the Contractor or other employee of any subcontractor shall, unless SEA is provided prior notice of and approves such work, engage in (a) other work for Proponent or (b) any work, relating to the Undertaking before the Board, any cooperating agencies that may elect to participate in this process, or any other party to this proceeding during the course of this proceeding.
- E. The Proponent shall bear the costs incurred by the Contractor, and by any subcontractor approved by SEA in accordance with Section III.A, in assisting SEA with meeting its responsibilities under the PA. The Proponent agrees to hold harmless and indemnify the United States of America and the Board with respect to any and all claims, demands, causes of action, and the like which may arise in performing the work under the contract between the Contractor and Proponent.

- F. Any contract between the Contractor and Proponent shall specifically limit any remedies available to the Contractor or subcontractors upon termination of the contract to affirmatively relieve the United States of America, the Board, and any officer, agent, or employee, from any liability from terminating the contract.

III. Board/SEA Responsibilities

- A. The Board has a statutory obligation as the lead Federal agency to fulfill the requirements of Section 106 (36 CFR 800) and, therefore, shall ensure that the stipulations identified in the PA are accomplished.
- B. SEA shall:
 - (1) Direct, review, and approve the work of the Contractor using SEA's best efforts to ensure that the work is reasonably necessary to comply with the terms of the PA. SEA shall ensure that Contractor does not duplicate work already done, unless SEA determines that the existing data are not adequate for use in preparing the cultural resources documentation;
 - (2) Designate appropriate staff to review and approve all work as it is developed and completed;
 - (3) Ensure that its representatives attend meetings, as needed, with Federal, state, regional, and local agencies, Tribes, and other interested parties, as well as any public hearings or meetings, necessary to ensure compliance with the terms of PA; and
 - (4) Provide information upon request to any planning, design, or construction engineers or technical staff employed by the Proponent.
- C. SEA will direct, supervise, and control the work of the Contractor to ensure that the Board's responsibilities under the PA, and related laws and regulations are being satisfied. As each portion of any draft or final document is completed, SEA staff shall review and approve that portion and those tasks completed, and/or direct further work with regard to that portion or task.
- D. SEA will monitor the Contractor to ensure that it is making adequate progress toward meeting specific time frames established in the Work Plan described in Section VI. It will be the responsibility of SEA to recommend any necessary corrective action to be taken under this MOU.
- E. In all instances involving questions concerning the content or relevance of any material (including all data, analyses, charts, and conclusions) prepared by the Contractor, SEA shall make the final determination on including, deleting, or revising any such material in the cultural resources documents.

- F. SEA, with the assistance of the Contractor, will receive all relevant comments submitted during the cultural resources review process and comment period. At the close of any public review and comment period, SEA in consultation with the Contractor, shall identify the issues and comments that will require a response from the Board. SEA may direct these comments to the Proponent and Contractor, as appropriate, to be included in the final cultural resources document. SEA may modify these responses as appropriate.

IV. Contractor Responsibilities

- A. The Contractor may engage subcontractors to perform work related to cultural resources review of the Undertaking, subject to the provisions of Sections III.C and III.D. All work performed by the Contractor or any subcontractors shall be under the direction and supervision, and approval of SEA. The Contractor and subcontractors, if any, will act as the agent(s) of the Board, not Proponent, in performing its/their duties.
- B. The Contractor shall provide:
- (1) Appropriate expertise in the areas of cultural/historic resources;
 - (2) A good working knowledge of the laws and regulations pertaining to the protection of historical and archaeological artifacts, including Tribal resources in the region affected by the Undertaking; cultural resources laws, applicable laws and regulations (including cultural resources regulations) administered or promulgated by the Board, CEQ regulations and guidelines, other applicable federal regulations, and applicable local ordinances and regulations;
 - (3) The capability to perform cultural resources inventories and treatment plans, and to prepare appropriate documentation;
 - (4) Thorough, readable, technically sound, and informative documents, as well as related charts, maps, diagrams, etc;
 - (5) Representatives to attend and/or facilitate meetings with one or more of the following: Federal, state, regional, and local agencies, Tribes, other interested parties, and the Proponent when appropriate. The purpose of these meetings include exchanging and obtaining information, explaining the Undertaking and related cultural resources concerns and potential impacts, and receiving comments in preparing the required cultural resources documentation;
 - (6) Expertise in data management; and
 - (7) Assistance to SEA in ensuring that the data collection, analyses, and methodologies for the cultural resources documents are complete, accurate, and relevant to SEA's needs for meeting the stipulations of the PA.
- C. The Contractor shall maintain and provide SEA upon request:
- (1) Adequate record-keeping and reporting systems to assure preservation of all data gathered, including surveys, studies, etc;

- (2) Logs summarizing all telephone calls, meetings, documentation reviews, and other substantive communications with SEA, the Proponent, Tribes, local governments, governmental agencies, citizens' groups, and any other interested parties; and
 - (3) Lists of all agencies, other railroads, citizens' groups, organizations, and individuals (including their respective addresses and telephone numbers) contacted in preparing the cultural resources documentation.
- D. The Contractor shall perform the work in a timely, responsive, satisfactory, and cost-effective manner, pursuant to a work schedule and milestones developed with SEA in coordination with the Proponent and approved by SEA. The Contractor shall provide written progress reports to the Proponent on a monthly basis. Report should be organized and presented on an earned value basis.
- E. The Contractor shall assist SEA in coordinating the exchange and preparation of all relevant cultural resources information and technical data/studies related to the Undertaking.
- F. The Contractor will submit directly to SEA any and all work the Contractor performs in preparing all required cultural resources documentation, studies, surveys, etc.
- G. Contractor shall follow the directions and instructions of SEA, and incorporate them into the cultural resources document(s) in a timely and responsive manner. Contractor shall submit preliminary and final drafts of any documents to SEA for review and comment.
- H. The Contractor, and any approved subcontractors, shall cooperate fully with SEA in organizing, participating in, and conducting any public workshops, informational meetings, and other meetings, as SEA determines are necessary, to foster public understanding of and/or participation in the cultural resources review process, and to assess potential cultural resources impacts and develop mitigation measures related to the Undertaking.
- I. The Contractor shall assist SEA in reviewing comments received during the cultural resources review process, ensure that these comments are readily accessible to the public by assisting SEA in entering and scanning these comments into SEA's Environmental Correspondence Tracking database, draft a summary of comments, and will coordinate analysis of these comments with SEA.
- J. The Contractor shall assist SEA in preparing the required cultural resources documentation and development of mitigation measures.
- K. The Contractor's Project Director, Project Manager, and other technical experts, as appropriate, shall be available to attend all meetings, briefings, consultations, and site visits as SEA deems necessary to ensure compliance with the terms of the PA.
- L. The Contractor and any of its subcontractors shall refer all media/press inquiries directly to SEA.

V. Proponent Responsibilities

- A. The Proponent, including its staff and representatives, shall provide to SEA and the Contractor any requested supportive expertise, resources, data, and technical capabilities necessary to undertake the cultural resources analysis, subject to the right of the Proponent to advise SEA of any request received from SEA or the Contractor that the Proponent believes either is not germane to matters appropriately reviewed in the cultural resources review process, is contrary to applicable statutes and regulations, would impose an extraordinary burden on the Proponent, or is subject to the right of the Proponent to maintain confidentiality as to proprietary, privileged, or other information which is not otherwise subject to disclosure. In the event that Proponent so advises SEA, SEA shall determine whether the request is appropriate and shall so advise Proponent and Contractor of its determination. SEA, shall, to the extent possible, maintain the confidentiality of any information if so requested by the Proponent.
- B. Consistent with 36 CFR Part 800.2, the Proponent may fund and perform such tasks as necessary for information gathering and data analysis to satisfy SEA's information needs as lead federal agency under Section 106 of the NHPA. The Contractor may assist the Proponent to ensure that such efforts are consistent with applicable professional standards and guidelines. The Proponent will coordinate information gathering and documentation with SEA and the Contractor consistent with the Work Plan specified at Section VI.
- C. The Proponent shall retain the Contractor to assist SEA in preparing all required cultural resources documentation and services, as that assistance and its costs are defined by a contract to be negotiated and executed by the Proponent and Contractor, and in the Work Plan described in Section VI.
- D. The Proponent shall provide complete, accurate, relevant, and timely responses to all reasonable requests for information pertaining to the Undertaking to the Board.
- E. The Proponent and any subcontractors shall cooperate fully with SEA in organizing and participating in any public workshops, hearings, and agency or other meetings, as SEA determines are necessary (1) to foster public understanding and/or participation in the cultural resources review process and (2) to assess potential cultural resources impacts and mitigation measures related to the Undertaking.
- F. With respect to all reports, analyses, and documents, including drafts, supplements, and final copies of the cultural resources documents, Proponent shall be responsible for the Contractor's administrative and clerical costs, as well as the costs of graphics, maps, layout, mailing, and printing, as those costs are defined by a contract to be negotiated and executed by the Proponent and Contractor. However, the Proponent shall have the option of directing that the printing of the cultural resources documentation be performed by an entity of its own choosing. The Proponent shall be solely responsible for the cost of preparing and providing to SEA the appropriate number of copies of all required cultural resources documentation.

- G. The Proponent shall provide complete, accurate, relevant, and timely response to all reasonable requests for information pertaining to the Undertaking to the Board, the Operating Plan, and the cultural resources aspects and effects of the proposed rail construction and operation.
- H. Proponent shall promptly review and provide comments to SEA on cultural resources materials or information as requested by SEA during the document process outlined in Section II, *supra*.

VI. Work Plan

- A. The Contractor, in consultation with SEA and Proponent, shall submit a draft Work Plan to SEA for preparing the required cultural resources documentation in compliance with the terms of the PA within thirty (30) days after all parties have signed this MOU. The draft Work Plan shall contain at least the following elements:
 - (1) A description of all work to be performed (including preparing and sending consultation letters; participating in public and agency meetings; outlining and drafting cultural resources documents; reviewing, analyzing, and summarizing public comments; conducting analyses, etc.);
 - (2) The projected schedule for completing the various tasks described, including milestones for key project deliverables;
 - (3) A list of work products needed from others for the Contractor to complete its work; and
 - (4) Identification of the Contractor's staff members who will be responsible for preparing, analyzing, and reviewing the work.
- B. Following receipt of the draft Work Plan, SEA, in consultation with Contractor and Proponent, shall finalize the Work Plan in a timely manner.
- C. The parties shall consult at least once every two weeks to confirm that the work is being performed as required and in the most efficient and cost-effective manner and to consider possible measures to improve the efficiency and cost-effectiveness of performance of the work. The Contractor shall provide written progress reports to SEA.

VII. Nonperformance and Termination

- A. The Proponent or Contractor shall notify SEA of any concerns either party might have with respect to the other party's performance under the contract between the Proponent and Contractor or this MOU. All parties will attempt to resolve, in good faith, any disputes or disagreements.
- B. If SEA determines that the Contractor is not adequately performing its responsibilities and duties in accordance with this MOU, SEA will discuss its concerns with the Contractor and Proponent. If SEA's concerns cannot be satisfactorily resolved, SEA will notify the Proponent that SEA is removing Contractor for cause. Upon removal of the Contractor, SEA shall endeavor to replace the Contractor with another qualified Contractor as soon as practicable.

- C. Both the Proponent and Contractor shall immediately notify SEA of any attempt by either party to modify or terminate the contract between the Proponent and Contractor. Termination of the Contract shall be subject to SEA's prior approval, after consultation with the Proponent and Contractor. Upon approving termination of the contract, SEA shall endeavor to replace the Contractor with another qualified Contractor as soon as practicable. Notwithstanding the foregoing, the Proponent may terminate the contract without SEA's approval in the event that it withdraws its intent to proceed with the Undertaking.

IX. Modification

This MOU may be modified only by written amendment executed by SEA, the Proponent, and the Contractor.

DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

By: _____

Title: _____

Date: _____

SURFACE TRANSPORTATION BOARD

By: _____

Title: _____

Date: _____

THE LOUIS BERGER GROUP, INC.

By: _____

Title: _____

Date: _____